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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, and the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado,

PETITIONERS,

v.

MALCOLM BALDRIDGE, in his official capacity as the Secretary of the U.S. Department of Commerce; DANIEL B. LEVINE, in his official capacity as the Acting Director of the United States Bureau of the Census; WILLIAM ADAMS, in his official capacity as the Acting Regional Director of the United States Bureau of the Census; the U.S. DEPARTMENT OF COMMERCE, one of the lawfully constituted departments of the United States of America; and the UNITED STATES BUREAU OF THE CENSUS one of the lawfully constituted agencies of the U.S. Department of Commerce,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Are the addresses of living units in the City and County of Denver deemed by the Census Bureau to be vacant on April 1, 1980 protected by the privilege of confidentiality of 13 U.S.C. §9?

2. Did the Order of the District Court, with its protective provisions, violate the privilege of confidentiality of 13 U.S.C. §9?

3. Does the interpretation and application of the protection of the privilege of confidentiality afforded by 13 U.S.C. §9 to the facts in this case by the Court of Appeals violate the Constitutional requirements of equal representation and one person-one vote?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

No.

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, and the CITY AND COUNTY OF DENVER, a municipal corporation of the State of Colorado,

PETITIONERS,

v.

MALCOLM BALDRIDGE, in his official capacity as the Secretary of the U.S. Department of Commerce; DANIEL B. LEVINE, in his official capacity as the Acting Director of the United States Bureau of the Census; WILLIAM ADAMS, in his official capacity as the Acting Regional Director of the United States Bureau of the Census; the U.S. DEPARTMENT OF COMMERCE, one of the lawfully constituted departments of the United States of America; and the UNITED STATES BUREAU OF THE CENSUS, one of the lawfully constituted agencies of the U.S. Department of Commerce,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, William H. McNichols, Jr., individually and in his official capacity as Mayor of the City and County of Denver, and the City and County of Denver, a municipal corporation of the State of Colorado, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 17, 1981.

OPINIONS BELOW

The order of the United States District Court for the District of Colorado (Carrigan, J.) is not officially reported but appears at page A-1. The opinion of Judge McKay for the Tenth Circuit Court of Appeals, not yet officially reported, appears at page A-7. The captions in those proceedings included Philip M. Klutznick as the Secretary of the U.S. Department of Commerce and Vincent P. Barabba as the Director of the U.S. Bureau of the Census, and Leo Schilling as the Regional Director of the U.S. Bureau of the Census; each of whom has been succeeded in office and has been replaced in the caption in This Court by Malcolm Baldridge, Daniel B. Levine and William Adams, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1981 and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

Section 9 of the Census Act, 13 U.S.C. § 9 reads as follows:

> § 9. Information as confidential; exception
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

STATEMENT OF THE CASE

A. Facts

In this action William H. McNichols, Jr., as an individual citizen and elector, and as the Mayor, of the City and County of Denver,

and the City and County of Denver complain that the count of the population within Denver is inaccurate and has been inaccurately reported by the Census Bureau which shall cause the improper apportionment of Congressional representation and apportionment of Colorado State senators and representatives and deprive the City and County of certain statutory rights. Petitioners claim that the government did not count all of the population in Denver and particularly, those persons who should have been counted and who reside in living units which the Census Bureau deemed to be vacant on Census Day.

In 1970 the Census Bureau certified that the population in the City was 514,800 people. The population for Denver has been consistently estimated and projected during the 1970's by the Denver Regional Council of Governments as being above 520,000 persons. The Denver Regional Council of Governments estimate of Denver's population for 1977 was 522,100; for 1978, 522,500; for 1979, 521,700; and for 1980, 521,300. The Denver Regional Council of Governments has been making estimates and projections for population in the Denver Metropolitan area for 25 years.

The City submits that its population is over 500,000 and bases its claim on the number of water and sewer taps permitted, the number of telephones installed, information contained in its Building Department records and its assessment records and information obtained from the Office of the Governor of the State of Colorado, the Denver Board of

Realtors, the U.S. Post Office, and the Denver Regional Council of Governments.

Although the Census Bureau's preliminary figures were increased from 455,000 to 491,651, the City registered its protest and made its challenge to the figures of the Census Bureau upon its receipt of these preliminary figures. Officials of the Census Bureau checked the status of occupancy of a few particular buildings which the City claimed had fewer vacancies than were shown by the data from the Census Bureau and confirmed to the City the number of vacancies in those particular buildings located in the City at the request of the City.

The City commenced and conducted a population and vacancy survey of its own which included surveying approximately one-third of the living units in the City which were selected for examination due to the relatively high vacancy rate assigned to those areas by the Bureau. The results of the population and vacancy survey of the City showed a 5.3% vacancy rate as opposed to the 9.6% vacancy rate of the Bureau; and that the Census Bureau indicated 46% more vacant units than did the survey of the City.

The opinion of the Assessor of the City is that the vacancy rate for the City on Census Day was 3%; and the opinion of one of the appraisers of the City was that the vacancy rate on Census Day was from 3% to 4%. The Census Bureau wrote off too many living units in the City as vacant.

The statistics and data of the Census Bureau indicate that the average number of persons residing in a living unit in the City is

2.2 persons. The Regional Administrator of the Bureau of the Census admitted at the hearing on the City's application for preliminary injunction that not every person in the City was counted by the Census Bureau in the 1980 Decennial Census.

B. Decisions Below

The jurisdiction of the District Court for the District of Colorado was invoked due to the existence of a federal question under 28 U.S.C. § 1331, 1337, 1361, 2201 and 2202, a claim under the Freedom of Information Act, 5 U.S.C. 552, and a claim concerning violation of rights guaranteed by Article I, Section 2, Clause 3 of the Constitution of the United States of America.

Petitioners initially sought a temporary restraining order keeping open the Census Bureau's Denver offices. The parties agreed, however, that the offices could close so long as the Bureau kept its updated master address list, known as the Follow-up Address Registers (FARs), in Denver during this lawsuit. Petitioners then sought a preliminary injunction requiring, in essence, that the Bureau cooperate with the City in verifying the vacancy data. The court did not rule on the preliminary injunction, and still has not, but focused instead on the question whether Petitioners should have access to the vacancy information in the FARs to check the Bureau's vacancy tabulations. After initially seeking the vacancy information in the FARs under the Freedom of Information Act, Petitioners also sought production of the documents under the federal discovery rules.

The Bureau maintained that the information in the FARs must remain confidential pursuant to a disclosure bar contained in 13 U.S.C. 9.

The district court found that:

(1) There is no way that the actual effect of the definitional differences between the methodologies of the City and the government, if any there be, can be verified and evaluated unless the City can discover the vacancy information in the FARs, which tell the City which dwellings the Bureau counted as vacant as of April 1, 1980*;

(2) To deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determinations concerning the 1980 Decennial Census;

(3) Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure of 500,000 is a threshold of city size affecting both the state and federal grants; and

(4) The vacancies in dispute could make up the difference between the 491,000 which the Bureau proposes and the 500,000 which Denver claims is its population at a minimum.

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*The government disregarded the results of the City's survey of one-third of the City which showed a substantially lower vacancy rate than that of the Bureau on the basis that the definitions and methodologies used by the City were incorrect and different from those of the Bureau and invalid. Due to the subjectivity of these matters, the only place to start comparison must be the data leading to the conclusions and the results.

The district court concluded that the purposes of Section 9 of Title 13, U.S.C. can be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

On this rationale the court entered a multipart discovery order:

(1) The government must produce the FARs, or alternatively, a list of vacant addresses culled from the FARs;
(2) all names and other identifying references must be deleted;
(3) all City employees given access to the information must take the same secrecy oath as Census Bureau employees;
(4) the information obtained may be used only to seek adjustment of the census; and
(5) Census Bureau officials may at their option accompany City employees seeking to verify the Census Bureau's vacancy data.

The district court certified its order for immediate appeal under 28 U.S.C. § 1292(b) and stayed its order temporarily.

The Court of Appeals stayed the discovery order of the District Court and granted permission to take the interlocutory appeal and assumed jurisdiction under 28 U.S.C. § 1292(b). The Court of Appeals reversed the discovery order, holding that Congress had made the information sought by Petitioners immune from discovery and that there can be no judicial exception made to that immunity.

REASONS FOR GRANTING REVIEW

1. The issues in this case are important questions of federal statutory and constitutional law which

have not previously been, but should be, settled by This Court.

2. There exists a conflict between the decision of the Tenth Circuit Court of Appeals in this case and the decision of the Third Circuit Court of Appeals in the case of *Shapiro* v. *Klutznick*, captioned in This Court as *Baldridge* v. *Shapiro* and docketed as Case No. 80-1436 for which certiorari has already been petitioned by the federal defendants. The Second Circuit Court of Appeals denied permission to the federal defendants to take an interlocutory appeal of a similar discovery order of the District Court for the Southern District of New York in *Carey* v. *Klutznick*, No. 80 Civ. 4550 (S.D.N.Y. Dec. 29, 1980), appeal pending No. 81-6042 (2nd Cir.).

ARGUMENT

THE INTERPRETATION AND APPLICATION OF THE PRIVILEGE OF CONFIDENTIALITY OF 13 U.S.C. §9 TO THE FACTS IN THIS CASE BY THE COURT OF APPEALS VIOLATES THE CONSTITUTIONAL REQUIREMENTS OF EQUAL REPRESENTATION AND ONE MAN-ONE VOTE

This Court has held that Article I, Section 2, of the Constitution means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *Westberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964), and that "our Constitution's plain objective [is to make] equal representation for equal numbers of people the fundamental goal." *id.* at 18. See also *Wells* v. *Rockerfeller*, 394 U.S. 542 (1969); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

Petitioners allege an impairment of their "right to a vote free of arbitrary impairment," *Baker* v. *Carr*

369 U.S. 186, 208 (1962), in that an inaccurate census count of the population of the City and County of Denver shall result in the improper apportionment of Congressional and state legislative representation. The states must, as a practical matter, rely on the federal census data for the purposes of congressional redistricting. *Kirkpatrick* v. *Preisler, supra; Prigg* v. *The Commonwealth of Pennsylvania,* 41 U.S. 539 (1842). The Constitution and statutes of the State of Colorado require that census data be used in districting not only for congressional representation but also the representation of both houses of the State General Assembly. Colo. Constit. Art. V, Sect. 44 through 48; 2-1-101 C.R.S. 1973, *et seq.,* as amended, and 2-2-101 C.R.S. 1973, *et seq.,* as amended.

Petitioners recognize that mathematical exactness or precision is "hardly a workable constitutional requirement," *Reynolds* v. *Sims,* 377 U.S. 533, 577 (1964), with respect to the census count of the population in the United States. But in this case, the evidence shows that there is substantial doubt as to the accuracy of the census for the City and County of Denver and that there is a practicable way to make the census more accurate. The statistical data from sources such as numbers of telephones, water taps, sewer taps, building permits, electric and gas connections and usage, and studies of population by traditional agencies of regional government, as well as the results of the special survey of the City of one-third of the living units in the City and County of Denver belie the preliminary population figures of the Census Bureau.

The area which appeared to cause the inaccuracy of the Census Bureau was its deeming too many of the living units of the City and County of Denver vacant and therefore not counting the people who reside in those living units. Petitioners proposed that these

be verified as against the results of the City's special survey as well as for the remainder of the City. The Census Bureau balked at the ideas that it erred and that the information gathered by the City was valid and that any such verification would be worthwhile or produce results different from the preliminary figures.

The trial court disagreed with the Census Bureau after having heard testimony and received evidence on Petitioners' application for a preliminary injunction. The District Court found that while it may be that definitional differences between the City and the Census Bureau as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City, there is no way that the actual effect of such definitional differences can be verified unless the City can discover which dwellings the Bureau counted as vacant as of April 1, 1980.

The District Court found that to deny the City discovery of the information concerning vacant units will essentially deny it any meaningful ability to challenge the Bureau's determinations. The District Court recognized and stated in its order that extremely important constitutional rights are at stake in this case, including the representation in Congress and in the State General Assembly.

The purpose of Title 13 U.S.C. is to enable and assure an accurate and complete enumeration of the population so that in districting for legislative representation, each man's vote will be equal to another's. However, in this case, the claim of the Census Bureau and the interpretation and application of the Court of Appeals of the confidentiality provisions of that statute impede the goal of an accurate and complete enumeration.

Petitioners do not submit that the confidentiality provisions of Title 13 U.S.C. are themselves unconstitutional, but only that the interpretation and application of those confidentiality provisions to the facts in this case result in an impermissible restraint on attaining the most accurate and complete enumeration which, as a practical matter, can be performed under these circumstances.

THE ADDRESSES OF LIVING UNITS IN THE CITY DEEMED TO BE VACANT ON APRIL 1, 1980 BY THE CENSUS BUREAU ARE NOT PROTECTED BY THE PRIVILEGE OF CONFIDENTIALITY OF SECTION 9 OF THE CENSUS ACT

The purpose of the confidentiality afforded certain data gathered by the Census Bureau is to assure that respondents will not be identified as a result of responding to the Census. The City's request for a list of vacant housing units is not interdicted by, nor does it abrogate, this concern and purpose because these address lists will not disclose the names and identities of census respondents. The order of the trial court expressly provides that this information shall not be provided to the City.

13 U.S.C. § 9(a)(1) does not bar disclosure since the "use [of] the information furnished under the provisions of this title [is prohibited] for any purpose other than the statistical purposes for which it is supplied." The City will use these lists for precisely those statistical purposes for which that information is intended, i.e., to ensure an accurate count of the population of the City in the 1980 Decennial Census. A fair reading of the term "furnished" in view of the purposes of § 9 is that it is intended to encompass personal information provided by the Census Bureau by census

respondents. The order of the trial court expressly limited the use of this information to the purposes of the 1980 Decennial Census.

The Court of Appeals cites only *Seymour* v. *Barabba*, 559 F.2d 806 (D.C. Cir. 1977) as authority for its strict interpretation of an absolute interdiction of the confidentiality provisions of 13 U.S.C. § 9. Unlike the instant case, the plaintiffs in *Seymour* were not seeking disclosure of census information for statistical purposes; rather those plaintiffs sought names and addresses for the purpose of sending notices to potential class members in an anti-trust action. Moreover, the plaintiffs in *Seymour* sought disclosure not just of addresses but of names and addresses of companies the Census Bureau had placed in twenty one substantive categories. The categories described the businesses of the firms listed, and, hence, obviously reflected the information provided by the companies in the census reports.

13 U.S.C. § 9(a)(2) does not bar disclosure since the City seeks no "publication" of the list of vacant units.

13 U.S.C. § 9(a)(3) does not bar disclosure since the City does not seek to examine census questionnaires.

THE ORDER OF THE DISTRICT COURT DID NOT VIOLATE THE PRIVILEGE

Assuming, *arguendo*, that the addresses of vacant living units are protected by the privilege of confidentiality because, as the government argues, that information was directly or indirectly furnished by respondents to the census, the order of the District Court did not violate that privilege.

The District Court determined that the withholding of the addresses of vacant living units would deny

the City any meaningful ability to challenge the Bureau's determinations of the population of the City and that the discovery of those addresses is clearly relevant and indispensable to the City's case. The District Court further found that the purposes of Section 9 of Title 13, U.S.C. can be maintained, and conditioned and subjected the discovery order by (1) allowing the Bureau to provide lists of vacant units as opposed to the Follow-up Address Register itself, (2) allowing the Bureau to shield the identity of respondents to the census, (3) requiring the employees, officers and agents of the City who would have access to those addresses to be sworn to the same oath of secrecy as are personnel of the Bureau, (4) restricting access to the information to those persons so sworn to secrecy, (5) subjecting those persons to contempt of the Court for violation of the non-disclosure limitations, (6) restricting the use of the information to the seeking of the correct population figure for the City, (7) prohibiting the publication of the addresses, (8) allowing personnel of the Bureau to monitor and participate in the activities of the City in using the information, and (9) requiring the City to pay the expenses associated with the disclosure and the use of the information in the event that the City fails to succeed in showing that its population exceeds 500,000.

The City submits that this information shall be as secure as, if not more than, it is presently. The safeguards include not only those applicable to personnel of the Bureau, but also the superintendence and order of the District Court. The privilege will be honored and will remain whole.

CONCLUSION

The discovery order of the District Court is not prohibited by the confidentiality provisions of the Census Act but is consistent with the purposes of that

Act and of the U.S. Constitution. To deny Petitioners discovery of the information concerning vacant living units is essentially to deny it any meaningful ability to challenge the population determinations of the U.S. Census Bureau in the 1980 Decennial Census. The information must be provided to the City to ensure the realization of the Constitutional requirement of one man one-vote. For these reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL, 1981

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 80-C-1151

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS,

VS.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS.

ORDER

The plaintiffs in this action challenge the population count reached by the Bureau of the Census for the City and County of Denver, Colorado. The plaintiffs filed a motion for temporary restraining order and a motion for preliminary injunction. In connection with those motions, the Court has heard extensive evidence regarding the Census Bureau's methodology and the City's challenges to the census count. The Court is therefore well acquainted with the issues ultimately to be raised on the merits.

In addition, the plaintiffs have filed a request for production of documents, together with a motion to have production expedited because of the short time period in which census challenges must be determined. In that request, the plaintiffs seek the "Follow-Up Address Registers" (FARs) and "any and all other documents relating to the taking of the 1980 Decennial Census in the City and County of Denver."

The thrust of the City's challenge to the census is directed to the Bureau's determination that there were over 16,000 vacant housing units in the City on April 1, 1980, the effective date of the census. The City's trained and experienced real estate assessment personnel have conducted actual checks of about one-third of Denver's residential real estate units, and as a result of that survey, the City contends that the Bureau has "over-counted" vacancies by a factor of 46%. However, it has been impossible for the City to challenge the Bureau's finding that any particular housing unit was "vacant" on April 1, 1980 because the Bureau has declined to inform the City which units it counted as vacant. For the purpose of contesting the vacancy count, the City seeks to discover the list or register of those dwellings defined by the Bureau as "vacant" in the 1980 census. The Court therefore concludes that the request for production essentially relates only to the FARs, or other documents which contain the vacancy information, and this Order is directed only to those documents. The City has conceded that production of the FARs will satisfy the instant discovery request, despite the overbreadth of its original request for production.

The Bureau in refusing the discovery request, relies primarily on the contention that the information sought is confidential because it falls within the meaning and intent of 13 U.S.C. section 9. The Bureau argues that Congress provided for confidentiality of all census return information in order to assure voluntary compliance by census respondents so that accurate data can be compiled, and that section 9 prohibits the discovery here sought.

In response, the City contends that the purpose of the confidentiality provision would not be undercut by providing vacancy lists, since neither the names of

census respondents nor answers to census questions need be provided. In addition, the City argues that 13 U.S.C. section 9 does not bar this discovery because that section only prohibits "use [of] the information furnished for any purpose other than the statistical purpose for which it is supplied." The City asserts that this is precisely the purpose, and the only purpose, for which the information will be used.

The Court has considered carefully the foregoing arguments as well as the evidence presented by both sides in the substantial proceedings held to date. In particular, the Court has considered evidence presented by the Bureau which indicates that definitional differences between the parties as to what constitutes a "vacancy" may account for the difference in vacancy figures obtained by the Bureau and those obtained by the City. Despite this evidence, it appears to the Court that there is no way that the actual effect of the definitional difference can be verified unless the City can discover the FARs, which will tell the City *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny the City discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination. Extremely important constitutional and statutory rights are at stake in this case. The final census count will affect Denver's representation in Congress and both houses of the Colorado General Assembly for the ensuing decade. Moreover, the population figure 500,000 is a threshold of city size affecting both state and federal grants. The Bureau proposes a 1980 census for Denver just over 491,000, whereas Denver claims its population is over 500,000 and that the vacancies in dispute would make up the difference if fully counted. The Bureau has admitted that it undercounted by about 2.5% as a national average in 1970. Obviously

an adjustment of that magnitude also would put Denver over 500,000.

Considering the intent and purpose of the confidentiality requirements of 13 U.S.C. section 9, the Court concludes that the purposes of that section can be maintained in this case without denying the City the right to discovery of documents clearly relevant and indispensable to its case.

Accordingly, it is

ORDERED that the defendants shall produce the FARs for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980;

ORDERED that the defendants shall delete from said information any and all names of persons or other references which might identify respondents to the census, either directly or indirectly;

ORDERED that every employee, officer, or agent of the City and County of Denver before having access to the information provided shall be sworn to the same oath of secrecy and confidentiality as required of personnel of the Bureau of the Census;

ORDERED that the plaintiffs shall not allow any person subject to their control and not subject to such oath access to the information made available hereunder;

ORDERED that a copy of this Order shall be served upon every employee, officer or agent having access to the information provided by the Bureau, and every such employee is hereby ORDERED not to disclose such information to anyone not subject to the oath of confidentiality;

ORDERED that the information provided pursuant to this Order shall not be used for any purpose except

to seek the correction or adjustment of the population figures for the City and County of Denver for the 1980 census;

ORDERED that the information provided hereunder shall not be publicized or made public in any way;

ORDERED that the defendants may at their option provide one more of their employees, officers or agents to accompany each employee, officer or agent of the plaintiffs in checking and verifying the April 1, 1980, status of occupancy or vacancy of the living units at issue, and in the event that the defendants elect to follow this procedure and the population of the City and County of Denver is ultimately determined to be under 500,000, the defendants may apply to the Court for reimbursement by the City of the reasonable and necessary expenses incurred in making this cooperative effort with the plaintiffs;

ORDERED that the plaintiffs, by accepting the information made available through this Order, accept as a condition thereof the foregoing Order regarding payment of the defendants' reasonable and necessary expenses;

ORDERED that this Order shall be effective immediately as of the date written below; provided, however, that enforcement of the Order is hereby stayed for a period of seven days from that date, and

ORDERED that a copy of this Order shall be served immediately on the United States Attorney for the District of Colorado.

Finally, the Court finds and concludes, pursuant to 28 U.S.C. section 1292(b), that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

DATED at Denver, Colorado, this 17 day of September, 1980.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN, Judge
United States District Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2023

WILLIAM H. MCNICHOLS, JR., individually and in his official capacity as Mayor of the City and County of Denver, et al.,

PLAINTIFFS-APPELLEES,

vs.

PHILIP M. KLUTZNICK, in his official capacity as the Secretary of the U.S. Department of Commerce, et. al.,

DEFENDANTS-APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case No. 80-C-1151)

John F. Cordes (Alice Daniel, Assistant Attorney General, and Leonard Schaitman, Attorney, Civil Division, Department of Justice; and Joseph F. Dolan, United States Attorney for the District of Colorado, with him on the briefs), Civil Division, Department of Justice, Washington, D.C., for Defendants-Appellants.

George J. Cerrone, Jr., Assistant City Attorney (Max P. Zall, Attorney for the City and County of Denver, with him on the brief), Denver, Colorado, for Plaintiffs-Appellees.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

McKay, Circuit Judge.

The action underlying this properly certified interlocutory appeal is a challenge to the population count reached by the Bureau of Census for the City of Denver, Colorado. The focal point of the litigation at this stage is the plaintiffs' charge that the Bureau has "over-counted" the number of vacant housing units in Denver. The plaintiffs, asserting their interests in the census count's effect on congressional representation and in various federal grants based on census figures, sought discovery of the Bureau's list of addresses of Denver's allegedly vacant housing units. The information sought by the plaintiffs is derived from the Bureau's questionnaire program and follow-up interviews. The Bureau resisted discovery because of the express prohibitions of 13 U.S.C. § 9(a) which provides:

> 9. Information as confidential; exception
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> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
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> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
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> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
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> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.
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> No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title,

> shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

Notwithstanding the express language of the statute and the "emphatically expressed intent of Congress to protect census information," *Seymour v. Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977), the district court:

> ORDERED that the defendants shall produce the FARs[1] for the City and County of Denver to the plaintiffs, or the defendants may, alternatively, produce a list derived from the FARs which simply lists the addresses of those living units in the City and County of Denver which the Bureau has determined to have been vacant on April 1, 1980 . . .

Record, vol. 1, at 37. The court's order tacitly acknowledged that it constituted an evasion of congressionally mandated confidentiality by directing that plaintiffs' personnel who received the address lists should be sworn to the same oath of secrecy and confidentiality as required by the personnel of the Bureau of the Census and by otherwise limiting any further publication of the ordered information.

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[1] FARs are "follow-up address registers" representing updated master address lists which include the Bureau's classification of housing units as either vacant or occupied.

There can be no question that Congress has the power to make census information gathered at its direction immune from discovery. Both the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality. *See Seymour v. Barabba*, 559 F.2d 806 (D.C. Cir. 1977).

The plaintiffs contend, however, that their request for a list of vacant housing units should be honored. The principal thrust of the plaintiffs' argument is that the information should be released because without it they cannot meaningfully challenge the Bureau's determination of Denver's population. Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument. The government has promised its citizens that census information will be kept confidential. 13 U.S.C. §§ 8(b), (c), 9(a). In exchange for and in reliance on this promise, citizens cooperate with the government's census taking efforts relatively free of inhibitions that might otherwise distort their disclosures. In these times when confidence in the government's resolve to keep its promises to its citizens is not notorious, we should not readily find excuses to abandon or prohibit the enforcement of those promises. We do not believe that in the face of the congressional prohibitions, the trial court has authority to substitute its own techniques for protecting the confidentiality mandated by the statute.

The plaintiffs also suggest several interpretations of § 9(a) that lend support to the district court's order. We do not believe that the statute permits us

to conclude that the plaintiffs' intended use constitutes one of the "statistical purposes for which [the information sought] is supplied." 13 U.S.C. § 9(a)(1). Nor are we impressed that the word "publication" contained in 13 U.S.C. § 9(a)(2) should be so narrowly construed as to suggest it means only advertising the information in some press or broadcast media. The word obviously means disclosure to anyone other than those persons authorized in the statute itself.

The plaintiffs have argued that the information sought is not within § 9(a)'s ambit because it was not "furnished" by respondents. We do not think that the word "furnished" should be so narrowly construed, particularly in light of the provisions of § 8(b) which make clear that the prohibition is against the disclosure of "information reported by" respondents. The record clearly reflects that the information ordered released was disclosed by Census respondents.[2]

No doubt the cities and counties and their residents face difficult financial problems which may be substantially affected by the uses to which census data will be put. Their remedies, if any, must lie in some device other than devices expressly prohibited by a congressional exercise of constitutional authority. The order of the district court violates the provisions of 13 U.S.C. § 9 and must therefore be reversed.

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[2]Plaintiffs have also argued that the challenge to the court's order is moot or that § 9's requirements have been waived because of some alleged breaches of the prohibitions of § 9 by Bureau employees in New Mexico. The record reveals that there is no merit to this argument.